Office-Supreme Court, U.S.
FILED
AUG 29 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 82-1005, 82-1247, and 82-1591

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CHEVRON U.S.A. INC., a corporation,
Petitioner,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS

Pacific Legal Foundation (PLF) respectfully submits this brief in support of petitioners, Chevron U.S.A. Inc., American Iron and Steel Institute, and Administrator, United States Environmental Protection Agency pursuant to Rule No. 36 of the revised Rules of the Supreme Court of the United States. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Organized and operating under the laws of California, PLF is a nonprofit, tax exempt public interest law firm with over 18,000 contributors located throughout the country. Policy is set by a 18-member Board of Trustees, composed of concerned citizens, a majority of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action of the Foundation and authorizes legal action only where PLF's position has broad support within the general community and is in the public interest. The PLF Board of Trustees has authorized the filing of this brief amicus curiae.

Due to its unique perspective of representing the public interest, PLF is most interested in a resolution of the statutory and public policy issues inherent in application of the plantwide definition of "source" in nonattainment areas (areas in which air quality does not meet federal standards) and thus in the litigation at bar. The interest of PLF is heightened as a consequence of many PLF contributors and members of PLF's Board of Trustees residing in areas subject to the regulations at hand.

Further, PLF believes that there is great public interest in achieving clean air by means which consider the economic well-being of this nation. Thus, there is also significant public interest in the activities of Environmental Protection Agency (EPA) in enforcing the Clean Air Act. The regulations at issue here are of particular public interest in that they seek to strike a delicate balance between the congressionally mandated requirements to attain clean air and to enhance the economic well-being and productive capacity of the nation's population.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 685 F.2d 718 (D.C. Cir. 1982).

SUMMARY OF ARGUMENT

I. The purposes and goals of the nonattainment sections of the Clean Air Act (42 U.S.C. §§ 7501 through 7508)[1] include enhancement of this nation's economic well-being. This premise is supported by 42 U.S.C. § 7401(b)(1), which defines the purposes of Subchapter I—Programs and Activities (which encompasses the nonattainment provisions), as well as the legislative history of the bill which established the nonattainment provisions of the Clean Air Act. Due to the fact that enhancement of the economy of the United States is one of the congressionally mandated

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[1]Throughout this brief, reference is made to the nonattainment sections of the Clean Air Act. Such reference is limited herein to 42 U.S.C. §§ 7501 through 7508 and the requirement therein that nonattainment permits are a prerequisite to the construction and operation of new or modified major stationary sources.

purposes of the nonattainment program administered by EPA, satisfaction of this goal is properly pursued through the regulations promulgated by EPA. Pacific Legal Foundation argues that enhancement of national productive capacity was a proper consideration of the October 14, 1981, EPA regulations in question.

II. Scientific and environmental spokesmen agree with EPA that the economic needs of the country must be considered when promulgating environmental regulations. Their statements reflect a broad consensus for and the importance of considering the economic needs of the United States in developing environmental programs and policy.

III. States have the primary responsibility for implementing and meeting the goals of the Clean Air Act, yet to do so they need substantial flexibility in choosing their strategies. The latitude to be granted the states must include the option to adopt a plantwide definition of source. Allowing the states to adopt a plantwide definition of source will not permit states to avoid meeting national air standards, nor will it preclude states from establishing a more stringent definition of source.

IV. Both goals of the nonattainment provisions of the Clean Air Act, enhancement of the nation's productive capacity, and attainment of ambient air quality standards are met with EPA's plantwide source definition. They are not met by use of the prior dual source definition which is preferred by the court below. Since EPA will allow a state to use the bubble concept only if reasonable further progress toward attainment of air quality standards is shown through an EPA approved state implementation plan, the plantwide definition will not negatively impair

reaching national air quality standards. This is particularly true since utilization of the plantwide definition of source provides industry with the economic incentives to replace older, polluting equipment with newer less polluting equipment. This economic incentive is noticeably absent in the use of the dual definition of source which, as a consequence, has contributed to a slow growth economy. This negative impact on the economy and on air quality is contrary to the goals of the nonattainment program and may be corrected through use of the plantwide definition of source.

V. The court below abused its judicial discretion and violated the applicable standard of review in this case. The law articulates a standard of wide discretion which is to be accorded administrative agencies in their promulgation of regulations. The scope of judicial review is narrow and a reviewing court may overturn regulations adopted by an agency only if such regulations are adopted in a manner which is arbitrary and capricious. EPA substantiated its promulgation of the regulations at issue and acted within the wide latitude accorded an agency. The action of the court below in vacating the October 4, 1981, regulations violated the standard of review.

ARGUMENT

I

THE GOALS OF THE NONATTAINMENT PROVISIONS OF THE CLEAN AIR ACT INCLUDE ENHANCEMENT OF THIS NATION'S ECONOMIC WELL-BEING

The Clean Air Act admonishes that among the purposes of its programs is the enhancement of economic well-being.

Title 42, United States Code, Section 7401(b)(1) clearly states:

> "The purposes of this subchapter are—to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare *and the productive capacity of its population.*" (Emphasis added.)

Legislative history of the nonattainment provisions of the Act expressly states that one purpose is "*to allow reasonable economic growth* to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date." H.R. Rep. No. 294, 95th Cong. 1st Sess. 211, *reprinted in* 1977 U.S. Code Cong. & Ad. News 1290 (emphasis added). *See also* H.R. Rep. No. 294 at 13, 1977 U.S. Code Cong. & Ad. News at 1091, for the proposition that the goals of the nonattainment program were equivalent to the goals of Subchapter I—Programs and Activities (42 U.S.C. §§ 7401 through 7508), those goals being to attain air quality standards and to provide for new economic growth. Further history of congressional intent to allow economic development in nonattainment areas is found in comments made on the floor of the House by California Congressman Henry Waxman. Representative Waxman, a noted environmental proponent, stated

prior to the vote on the 1977 amendments to the Clean Air Act that: "We have struck a proper balance between environmental controls and economic growth in the dirty air areas of America. . . . [N]either [pollution control nor new jobs] need be compromised." 123 Cong. Rec. 27,076 (1977).

Courts have adhered to this statutory mandate. In enacting standards for state implementation plans needed to meet national ambient air quality standards, EPA must weigh economic factors. *Anaconda Company v. Ruckelshaus,* 482 F.2d 1301, 1306 (10th Cir. 1973). *See also Pacific Legal Foundation v. Andrus,* 657 F.2d 829 (6th Cir. 1981); *Environmental Defense Fund, Inc. v. Costle,* 631 F.2d 922 (D.C. Cir. 1980). However, the court below ignored these precedents and determined that the favorable economic advantages of the plantwide definition were irrelevant. This is clear error.

II

EVEN ENVIRONMENTAL AND SCIENTIFIC SPOKESMEN AGREE THAT AS A MATTER OF POLICY PROMULGATIONS OF ENVIRONMENTAL REGULATIONS MUST CONSIDER ECONOMIC NEEDS OF SOCIETY

In addition to Congress and the courts, the scientific community has also begun to recognize the imperative of considering the economic needs of society when devising environmental protection programs.

Recently Mr. Gus Speth, President of World Resources Institute and former chairman of the Council for Environmental Quality, emphasized that

> "[t]he environmental community should realize the need for considering business and economic concerns.

> . . . Environmental conservation and economic growth are complementary." The Bureau of National Affairs, Inc., 14 *Environment Reporter* 158 (June 3, 1983).

Dr. S. Fred Singer, Professor of Environmental Sciences at the University of Virginia, Senior Fellow of the Heritage Foundation, and a member of the Acid Rain Peer Review Panel of the White House Office of Science and Technology Policy, recently implored to the American Association for the Advancement of Science that cost effectiveness of regulatory programs should be considered by the regulator and that "the 'serious damage' caused by acid rain could be controlled through a 'least cost approach like the bubble plans' now being used for controlling certain air pollutants in limited geographic areas." 14 *Enviromnent Reporter* at 157.

On June 27, 1983, the Acid Rain Peer Review Panel issued its General Comments and recommended that "additional steps should be taken now which will result in meaningful reductions in the emissions of sulphur compounds into the atmosphere beginning with those steps which are most cost effective." Office of Science and Technology Policy, Executive Office of the President, *General Comments on Acid Rain, A Summary by the Acid Rain Peer Review Panel for the Office of Science and Technology Policy* (June 27, 1983).

These comments are only a small sampling but they reflect the serious consideration of the scientific community regarding the use of concepts such as the bubble approach not only to meet clean air goals but also to control acid rain.

That EPA properly considered the economic costs as well as the environmental benefits of its regulations defining source for nonattainment areas is thus not only supported by the statute and case law, but also the rational viewpoints of the scientific community. By all accounts EPA acted within its congressionally approved role.

III

STATES NEED FLEXIBILITY TO ADOPT OR NOT ADOPT PROGRAMS SUCH AS THE PLANTWIDE DEFINITION IN ORDER TO SATISFY THEIR PRIMARY RESPONSIBILITY TO IMPLEMENT THE CLEAN AIR ACT

It is a basic premise that states historically have had the primary responsibility for protecting their citizens' health and welfare.

> "The powers of the states to protect the health and welfare of their citizens by statute, by an action to abate a nuisance, or by other means is well established." Renz, *The Effect of Federal Legislation on Historical State Powers of Pollution Control: Has Congress Muddied State Waters?*, 43 Mont. L. Rev. 199 (1982).

As far back as 1907, states exercised these powers in the area of air pollution. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907). In keeping with this role, states were expected to continue to have the primary responsibility in air pollution control through the implementation of the Clean Air Act. This fact was emphasized in the initial federal effort to reduce air pollution, where "the Air Pollution Control Act of 1955, declared that pollution control was the *responsibility of the states.*" Renz, 43 Mont. L.

Rev. at 201 (emphasis added). This Court has recognized that "the prevention and control of air pollution at its source is the primary responsibility of states and local governments." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64 (1975).

In order to be able to fulfill its role in implementing the Clean Air Act, a state needs sufficient flexibility. "Wide latitude" is to be accorded the states. *Id.* "The states' powers to guard against these threats [hazards to public health] cannot be limited if the states are to continue their historic role. . . ." Renz, 43 Mont. L. Rev. at 216. Though Congress and some courts have recognized the state's primary role and the need for flexibility, the court below did not.

In the opinion below, the court narrowly defined that the purpose of the nonattainment program was "undoubtedly to improve air quality in regions lagging behind in meeting the NAAQS."[2] *NRDC v. Gorsuch*, 685 F.2d 718, 727 (D.C. Cir. 1982). It discounted EPA's understanding that the purpose and nature of the nonattainment program was "to afford the states flexibility in designing revised SIPs[3] which will attain compliance with the NAAQS." The Court simply countered that "offering flexibility to the states may be a method of attaining that objective, but it is not an independent goal of the nonattainment scheme."

This is contrary to the intent and purpose of Congress, as reflected in House Report No. 294.

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[2]National Ambient Air Quality Standards (NAAQS). Section 109 of the Clean Air Act, 42 U.S.C. § 7409.

[3]State Implementation Plans (SIPs) for the Attainment, Maintenance and Enforcement of NAAQS. Section 110 of the Clean Air Act, 42 U.S.C. § 7410.

In discussing the nonattainment provisions of the Clean Air Act Amendments of 1977, codified at 42 U.S.C. §§ 7501 through 7508, the House committee stated that there are "two main purposes: (1) to allow reasonable economic growth to continue in an area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) *to allow states greater flexibility for the former purpose than EPA's present interpretative regulations afford.*" H.R. Rep. No. 294 at 211 (emphasis added). The lower court's judicial interpretation to the contrary simply does not mesh with legislative history, nor does it mesh with common sense. Congress believed that flexibility must be afforded a state in order to allow a state to meet all the purposes of the Clean Air Act. These purposes include reasonable economic growth. As shown *infra* this nation's economic growth will suffer needlessly if flexibility and the bubble concept are capriciously rejected.

IV

THE PLANTWIDE DEFINITION COMPLIES WITH THE GOALS OF THE NONATTAINMENT PROVISIONS OF THE CLEAN AIR ACT. THE DUAL DEFINITION PREFERRED BY THE LOWER COURT DOES NOT

A. The Plantwide Definition Properly Promotes Attaining Ambient Air Quality Standards

EPA has frequently articulated that if a state chooses to define "source" on a plantwide basis that state is *still* subject to the requirements of 42 U.S.C. § 7502: The SIP must continue to demonstrate attainment of NAAQS and, in the interim until such standards are met, reasonable

further progress (RFP)[4] toward attainment by the statutory deadlines must be demonstrated (46 Fed. Reg. 50,767 (October 14, 1981)). Since a nonattainment state must demonstrate RFP, by definition that state must prove actual reductions in air pollution. And as stated above, demonstration of RFP is not precluded by use of the plantwide definition but, on the contrary, it is required.

For existing sources, EPA restricts the use of the alternative emissions approach in a nonattainment area to the situation where the source does not increase pollution: "[A]ll emissions under the bubble must be quantifiable and trade-offs among them must be equal in order to prove that the alternative emissions approach does not increase the level of overall emissions." Note, *An Overview of the Bubble Concept*, 8 Colum. J. of Envtl. L. 137, 142 (1982), which relies on 44 Fed. Reg. 71,780 through 71,781 (1979). Essentially, these EPA restrictions are present "to ensure that the bubble concept . . . [is] used to improve air quality rather than to continue air pollution." *Id.* As a result, the bubble concept furthers the goals of the nonattainment program by leading to attainment of NAAQS and simultaneously providing for economic growth, the same goals the plantwide definition would accomplish.

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[4]Title 42, United States Code, Section 7501(1) defines reasonable further progress as: "annual incremental reductions in emissions of the applicable air pollutant."

B. The Dual Definition of Source Discourages Air Pollution Reductions While the Plantwide Definition Promotes It Through Incentives

As EPA has repeatedly stated, "the dual definition was discouraging replacement of older, dirtier processes with new cleaner ones. It thereby acted as a disincentive to new investment and modernization and retarded progress toward clean air." 46 Fed. Reg. 50,766 (October 14, 1981) and 46 Fed. Reg. 16,281 (March 12, 1981). Quite simply, the current "technology-based standards provide little incentive for innovations that reduce emissions below state-of-the-art." Harrington and Krupnick, *Stationary Source Pollution Policy and Choices for Reform*, 21 Nat. Resources J. 539, 544 (1981). Similarly, clean air legislation has "led to serious delays and 'stretch-outs' in investment plans, delays which have the inevitable effect of extending the use of outmoded facilities and retarding technical change and economic growth." Haveman and Christainsen, *Environmental Regulations and Productivity Growth*, 21 Nat. Resources J. 489, 507 (1981). One of the primary reasons for this effect is due to the current regulations under which new sources of pollution are subjected to more stringent standards than existing sources. "This discrepancy between old and new plant requirements tends to reduce investment in plant and equipment, and remaining investment is diverted away from new plant construction and toward rehabilitation of older equipment. Innovation is retarded . . . ." Harrington and Krupnick, 21 Nat. Resources J. at 544.

Alternatively, the alternative emissions approach is believed by many, including EPA, to "actually have a beneficial effect on the development of pollution control

technology [since] the bubble would serve as an incentive for developing cost effective pollution control technology." Note, 8 Colum. J. of Envtl. L. at 155. Distinct from the current technology based pollution control standards, EPA has developed an "emissions trading policy" as an alternative for controlling emissions, which is a market approach to air pollution control. The bubble concept, one of four innovative regulatory mechanisms, takes advantage of market incentives to reduce air emissions at the lowest possible cost.

The Council on Environmental Quality (CEQ) has stated that these innovative regulatory mechanisms, including the bubble concept, "are needed in the 1980's if further gains are to be made at reasonable costs." 13th Annual Report of the Council on Environmental Quality, *Environmental Quality 1982*, 8. To illustrate that the bubble concept does meet the goals established by Congress for the nonattainment program, including reducing air emissions, CEQ cited a 3M factory in Bristol, Pennsylvania, which "used an innovative manufacturing process to *overcontrol* volatile organic compound (VOC) emissions in return for less control on other sources. This bubble reduced VOC emissions 1,000 tons per year more than would have been achieved through conventional compliance." *Id.* Evidence that the dual goals of reaching attainment and enhancing the productive capacity of the population (42 U.S.C. § 7401(b)) are met by the bubble concept is manifest in that "[b]y the end of 1982, EPA's efforts to encourage emissions trading had resulted in a number of *concrete cases where industry had reduced air emissions while simultaneously reducing capital and/or operating costs.*" 13th Annual Report of the Council on Environmental Quality at 76 (emphasis added). Overall, 21 of the 34 bubbles

approved or proposed by EPA reduce emissions further than legally required by NAAQS. *Id.* at 185. As shown by these figures, the bubble concept provides crucial environmental benefits for "through emissions trading, every firm has economic incentives to reduce its pollution beyond the requirements of the law." *Id.* at 184. The plantwide definition for new and modified sources would act in a similar fashion.

The strategy of providing industry with economic incentives to reduce their pollution was thus an important element of the Clean Air Act Amendments of 1977. President Carter actually highlighted this strategy when he signed the 1977 amendments into law: "The Act provides us with a new tool to help abate industrial sources of pollution by authorizing use of economic incentives to reduce noncompliance." Statement of Signing H.R. 6161 Into Law, 13 Weekly Comp. Pres. Doc. 1214 (August 15, 1977). Such important incentives, however, are conspicuously missing from the lower court's preferred approach to the nonattainment program. The plantwide definition strategy to reduce air pollution may be good, or bad, but it is not the court's role to disapprove it because the court prefers another strategy. The evidence shows that EPA's selected strategy not only works to reduce air pollution but also gives a needed boost to economic growth. Congress asked for no more. Neither should the Court.

C. The Dual Definition of Source Has Contributed to a Slow Growth Economy While the Plantwide Definition Will Promote Economic Growth

The environmental regulations promulgated under the Clean Air Act, particularly those which define "source" for

nonattainment areas on a dual basis, have resulted in the impairment of productivity and have contributed to diminished economic growth over the past several years.

The general premise is supported by findings of several legal and economic scholars:

> "Many causes have been suggested for *stagflation and declining productivity growth,* including . . . regulatory activities—in particular *environmental regulations.*" Haveman and Christainsen, 21 Nat. Resources J. at 489 (emphasis added).

"The *environmental policies* with the *greatest impact* on the national economy are probably those that limit industrial air and water pollution." Harrington and Krupnick, 21 Nat. Resources J. at 539 (emphasis added). Further, "it is reasonable to suggest that between 12 and 25% of the slowdown in productivity growth in the private sector of the economy between the early 1960's and the mid-1970's can be atttributed to the entire bundle of federal regulations." Haveman and Christainsen, 21 Nat. Resources J. at 498. And of those federal regulations, a reasonable estimate is that 8% to 12% of the slowdown in productivity is atttributable to environmental regulations. *Id.* at 508. Clearly, our nation's economy has not escaped unharmed from the extensive regulations promulgated by government at all levels and, particularly, the environmental regulations concerning air pollution.

The 8% to 12% loss in the productivity of the economy attributable to environmental regulation directly contravenes the purposes of Subchapter I of the Clean Air Act. This negative impact is partially attributable to the economic disadvantages in the existing approach of implementing the Clean Air Act for, "the existing structure of

air and water pollution regulation, particularly the prevention of significant deterioration and nonattainment provisions of the Clean Air Act, is a potentially serious obstacle to economic growth in the United States." Harrington and Krupnick, 21 Nat. Resources J. at 548.

Contrary to the current regulatory scheme, there are many positive aspects of the bubble concept. The National Commission on Air Quality (NCAQ) indicated that EPA adopted the bubble concept

> "as a result of studies suggesting that substantial cost savings could be achieved [through its utilization]. One study, completed by Maloney and Yandle (1979) for 52 DuPont Corporation plants, showed that allowing the use of the bubble concept at each of the plants to achieve 85 per cent emission reductions would reduce costs of emission control by 35 per cent over point source controls." National Commission on Air Quality, *To Breathe Clean Air: Report of the National Commission on Air Quality* 276 (1981).

NCAQ went on to state that the "resulting emissions will be equal to the emissions that would have occurred if specific point-source reduction had been required, however, substantial savings in costs should be realized." *Id.* at 276-77. The positive aspects of the bubble concept are further illustrated by the fact that during 1981, over 40 companies were developing bubble applications "showing savings of several million dollars each in either capital or operating costs." Harrington and Krupnick, 21 Nat. Resources J. at 557. Overall use of the bubble concept would result in improved allocation of resources, increased productivity and innovation, and reduced inflation. *Id.* at 558. It also is seen as "the means to a considerable reduction in the cost of

environmental policy with little, if any, sacrifice in environmental quality," *id.* at 562, as the bubble concept has been determined to be "environmentally benign," *id.* at 563.

One way to judge air pollution policy is to examine its cost effectiveness, which in this context has been defined as "the ability to achieve given environmental quality goals for the lowest possible costs." *Id.* at 542. In terms of cost effectiveness, NCAQ was correct in their assessment that the bubble policy is "perhaps the best known economic incentive approach to air pollution control." National Commission on Air Quality at 276. NCAQ further stated that utilization of the bubble concept would allow a facility to use a more cost-effective mix of emission reduction measures. *Id.* Thus, use of the bubble concept, which would be allowed only in those state implementation plans which provide for attainment of national ambient air quality standards while showing reasonable further progress, 46 Fed. Reg. 50,767 (1981), would result in reaching air quality standards in a more cost-effective manner. This is also underscored by CEQ's estimation that by "1988, expenditures for pollution abatement and other environmental quality programs will grow to nearly $70 billion in constant (1979) dollars. This represents an estimated annual real rate of growth of 6.6 percent. . . ." Portney, *The Macroeconomic Impacts of Federal Environmental Regulations,* 21 Nat. Resources J. 468 (1981). CEQ also estimates that $31.5 billion will be the cost by 1988 (in 1979 dollars) for water and stationary air quality controls alone. Haveman and Christainsen, 21 Nat. Resources J. at 495.

The purpose of enhancing the productive capacity of the nation cannot be accomplished under the current

environmental regulatory scheme. EPA's adherence to the bubble concept recognizes its statutory charge to consider the economic impacts as well as health benefits. The plantwide definition of source is one application of this concept. It is a step in the right direction fully within the authority of the Clean Air Act and should be upheld.

V

THE LOWER COURT IGNORED THE FACT THAT AN ADMINISTRATIVE AGENCY'S DISCRETION IN PROMULGATING REGULATIONS IS QUITE WIDE WHILE A REVIEWING COURT'S SCOPE OF REVIEW IS VERY NARROW

The decision of the Court of Appeals below can only be viewed as another attempt by that court to substitute its judgment on the propriety of environmental regulatory programs for the judgment of EPA. The Court of Appeals disagrees with EPA's policy decision and has improperly dissected the decision to ascribe an improper administrative motive behind the adoption of the plantwide definition. The court asks too much of itself and gives too little to EPA and such conduct by the court constitutes reversible error. As Justice Douglas stated: "The Court is not empowered to substitute its judgment for that of the agency." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

On June 6, 1983, this Court affirmed a basic premise of administrative law that an agency is to have wide discretion in promulgating regulations and a reviewing court is to have a very narrow scope of review. In *Baltimore Gas & Electric Co., et al. v. NRDC, et al.*, ... U.S. .....,

51 U.S.L.W. 4678 (June 6, 1983), writing for an eight to zero Court, Justice O'Connor stated:

> "Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. . . .'[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . . not simply because the court is unhappy with the result reached. *Vermont Yankee*, 435 U.S. at 558.'
>
> ". . . The role of the courts is simply to ensure that . . . the [agency's] . . . decision is not arbitrary or capricious." *Baltimore Gas & Electric Co. v. NRDC*, ...U.S. ....., 51 U.S.L.W. at 4680.

The Court continued, stating, "it is not our task to determine what decision we, as Commissioners, would have reached. Our only task is to determine whether the Commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co. v. NRDC*, ... U.S. ....., 51 U.S.L.W. at 4683.

Unquestionably an administrative agency is granted broad discretion to promulgate regulations. In defining *source* on a plantwide basis, EPA properly considered all the relevant factors including the economic impact of its action and articulated a rational connection between the facts found and the choice made. EPA carefully articulated that one policy it was pursuing in defining source on a plantwide basis was the attainment of NAAQS in those designated areas that had not yet achieved those standards (nonattainment areas). *See* 46 Fed. Reg. 50,767 through

50,768 (October 14, 1981). A relevant factor considered in promulgating the plantwide definition—state flexibility—likewise comports with the congressional mandate by enhancing productive capacity as well as promoting public health and welfare. *Id.* Moreover, EPA was "correct to look at the costs as well as the benefits" of the regulation involved. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* ..... U.S. ....., 51 U.S.L.W. 4953, 4959 (June 24, 1983).

The *Baltimore Gas* case and the instant case are factually similar—both concern the findings of an administrative agency which are within the agency's area of special expertise. In *Baltimore Gas* the Court stated its scope of review when an agency is acting within its area of special expertise. "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas & Electric Co. v. NRDC,* ..... U.S. ....., 51 U.S.L.W. at 4682. Herein EPA made the expert determination that implementation of the plantwide definition would not only promote public health and welfare by improving the quality of the nation's air but also would promote the productive capacity of this nation's people. Though a reviewing court is required "to give [the agency] some leeway where its findings must be made on the frontiers of scientific knowledge." *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 656 (1980), the lower court nevertheless discounted EPA's finding that the plantwide definition would properly promote clean air in nonattainment areas because of its belief EPA improperly considered the economic impact of its nonattainment program, 685 F.2d at 726-27. The court did not find, nor

could it, that the purpose of meeting NAAQS would not be met but nevertheless rejected the plantwide definition. This amounts to a dispute over the type of program selected by EPA to meet the objective of the Clean Air Act and is clearly outside the scope of judicial review. Unfortunately, the Court of Appeals improperly deferred to its predispositions and ignored EPA's expertise.

The Third Circuit Court of Appeals gives further insight into the role of a reviewing court within the limits of the highly deferential scope of review to be accorded agency promulgated regulations. NRDC complained below that EPA's promulgation of a plantwide definition of source was a substantial departure from the agency's prior definitions and course of rulemaking. Even if this assertion were true, there still is a wide degree of deference to be accorded to the agency's actions. Although the following language regards regulations promulgated by the Interstate Commerce Commission, it is insightful when applied to *any* administrative agency. "[E]ven when . . . rulemaking represents a departure from [an] agency's prior position, so long as the policies it is pursuing can be discerned from its opinion, and those policies are consistent with congressional directives, we must defer to the . . . agency judgment." *Bessemer and Lake Erie Railroad Co., et al. v. Interstate Commerce Commission*, 691 F.2d 1104, 1110 (3d Cir. 1982).

Bessemer also held that "[t]he choice by an agency among alternative means for satisfying a statutory mandate is exclusively for that agency." *Bessemer*, 691 F.2d at 1110. Congress directed EPA through the Clean Air Act to promulgate regulations to meet NAAQS's in

nonattainment areas. The choice for a plantwide definition of source among several alternatives is exclusively for EPA; and the court has not demonstrated that the plantwide definition will not satisfy the required statutory mandate. Thus, the court must accord great deference to EPA's program adoption, yet has failed to do so.

Moreover, contrary to the imputation of the lower court, "[t]he agency is not absolutely bound by its prior determinations, but rather may adjust its policies and rulings in light of experience." *Montana Power Co. v. EPA*, 608 F.2d 334, 347 (9th Cir. 1979). "EPA is free to make reasonable changes in the interpretation of its regulations . . . ." *Montana Power Co. v. EPA*, 608 F.2d at 348. *See also Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 289 (D.C. Cir. 1981).

In order to have properly overturned EPA's nonattainment program using the plantwide definition, the court must have found the implementing regulations were arbitrary and capricious. *Baltimore Gas*, 51 U.S.L.W. at 4680.

> "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Manufacturers Association*, 51 U.S.L.W. at 4956.

The lower court relied on two of these factors to find the plantwide definition for air pollution source in nonattainment areas arbitrary and capricious. First, the court points primarily to economic considerations as a factor Congress intended EPA not to consider. On the contrary, EPA's consideration of economic factors was intended by Congress to be considered by EPA in meeting NAAQS's in nonattainment areas. *See* Arguments I and IV, *supra.*

The second basis found by the lower court for overturning the plantwide definition was EPA's failure to support its action with evidence. In Footnote No. 41 of the opinion below, Circuit Judge Ginsburg criticized EPA for not basing its October, 1981, amendment of its regulations on any "study, survey, or support for the opposite position, now tendered by EPA, that the dual definition would indeed retard improvement of air quality in the aggregate." *NRDC v. Gorsuch,* 685 F.2d at 727. However, the court's statement ignored the facts articulated by EPA, 46 Fed. Reg. 50,768 (October 14, 1981), that comprehensive written comments with implementation examples were considered. "EPA believes that the examples provided by the commentators support its statement in the proposal that the dual definition impedes legitimate efforts to modernize existing plants. (*See, e.g.,* comments of Crown Zellerbach; Union Oil Corporation.)"

Additionally, EPA stated as of March, 1981, when it initially proposed the changes in the regulations, that it had reevaluated all of the arguments and facts on all sides

of the nonattainment issues and had concluded that the elimination of the dual definition requirement will remove a barrier to modernization of the nation's industrial base. 46 Fed. Reg. 50,768 (October 14, 1981). Such a conclusion of EPA, based upon comments and surveys from interested parties, reevaluation of all arguments on the issues, and its own expert judgment is not arbitrary and capricious.

As a side note, it is curious that the October, 1981, regulations were struck down due to a lack of evidence that the dual definition would retard growth and the plantwide definition would not adequately achieve ambient air quality standards. When promulgating the August 7, 1980, dual definition of source for nonattainment areas (45 Fed. Reg. 52,696 through 52,698 (August 7, 1980)), EPA failed to cite any study or survey supporting the definition's efficacy yet the court finds this fact of no interest. The court below was not at liberty to substitute its opinion for that of the agency, yet the above dichotomy suggests that this is precisely what the court did.

EPA's decision was based upon relevant considerations, did not run counter to the evidence before the agency, is plausible, and may be ascribed as the product of agency expertise. Based on these factors, the action of EPA cannot be considered arbitrary and capricious.

CONCLUSION

PLF respectfully submits that based on the foregoing arguments, the decision of the court below was contrary to the law and therefore is in error. The August 17, 1982, decision rendered by the United States Court of Appeals for the District of Columbia Circuit should be reversed and the regulations promulgated by EPA on October 14, 1981, should be reinstated. Such action by this Court will enable EPA and the states to more fully comply with the congressional mandates of the nonattainment provisions of the Clean Air Act.

August, 1983.

Respectfully submitted,

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